IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26/04/2004

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THE HONOURABLE MR. JUSTICE A.K. RAJAN

Criminal Appeal No. 508 of 1996

S.Rajkumar .. Appellant

-Vs-

State
rep. by its Inspector of Police
Thoraipakkam Police Station
Chennai 96.
(Crime No.3698/92) .. Respondent

!For Appellant .. M/s. R.Gandhi, Senior Advocate
V.Padmanaban
for Mr. R.G.Narendhiran

^For Respondent .. Mr. M.K.Subramanian,
Govt. Advocate (crl.side)

Criminal Appeals filed against the Judgment of the Assistant
Sessions Judge, Poonamallee, in SC.No.205 of 1993 dated 21.6.1996.

:J U D G M E N T

This is an appeal against conviction. The accused was charged for an offence u/s.376 IPC; the trial Court found him guilty; convicted and imposed a sentence of ten years RI. Against the conviction and sentence, this appeal has been filed.

2. The facts of the case, briefly, are as follows:
On 8.11.1992 at about 12.40 pm when PW1 was talking with his friends in his house, his daughter aged about six years, the victim girl was playing outside. Then PW1 heard the noise of her daughter; he along with his friends rushed there and knocked the door; which was bolted from inside. When the door was opened, his daughter was crying naked and blood was oozing out from her genital organ; the accused was trying to put on his pants; on seeing them, the accused ran away; he was chased and caught by them; the victim told as to what had happened. The accused was taken to the police station along with the victim and a complaint/Ex.P1 was lodged. The clothes of the victim was also found blood stained. The victim, examined as PW2, has deposed that when she was playing in the house, the accused took her along with her younger brother to the adjoining house (the keys of that house were

with the accused); he switched on the Television and they were watching the Television; after sometimes her brother/Sivakumar was sent out by the accused; the accused removed her clothes and committed rape on her; because of that act, blood was oozing out from her genitals; hence she cried; hearing her noise, her father/PW1 and others came there and caught the accused. PW3/Medical Officer in her evidence has stated that the genital of the victim was found swollen and it was due to forced intercourse; in Ex.P4/Certificate given by her, she has stated that the injury could have been caused by the man, as spoken to by the prosecution. Evidence of Pws.1 and 2 have been corroborated by PWs 4 to 8/neighbours; PW9/Asst. Professor of Forensic Science has deposed that the accused was potent; PW10, who has registered the complaint, has deposed that PW1 brought the accused to the police station along with the victim girl and gave the complaint; he also speaks about the investigation. PW11/Inspector of Police filed the charge sheet after completion of the i nvestigation. When questioned under S.313 Cr.PC, the

accused stated that on the date of occurrence he was aged about 16; his date of birth is 1.6.1975; and, all the witnesses deposed falsely against him. All the witnesses came to his house and took him to the police station.

3. The trial Court found the accused guilty u/s.376 IPC.
Aggrieved by the conviction and sentence, the present appeal has been filed.
4. The learned Senior Counsel for the appellant did not challenge the findings of the trial Court. His argument is only on the question as to whether the sentence of imprisonment imposed by the trial Court on the appellant can be sustained in view of the repeal of the Juvenile Justice Act, 1986 and the coming into force of the new Act/Act 56 of 2000.

5. The learned Senior Counsel submitted that on the date of the incident the accused did not complete 18 years of age; his date of birth is 1.6.1975; therefore, on the date of offence, he was aged about 17 years 5 months and 7 days. According to Section 2(h) of the Juvenile Justice Act, 1986 'Juvenile' means a boy who has not attained the age of sixteen years. But, the Juvenile Justice Act, 1986 was repealed on 1.4.2001 and The Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) has come into force. Section 2(k) of Act 56 of 2000 defines 'Juvenile' as a person who has not completed 18 years of age. Therefore, though the person is not a juvenile on this date (when the appeal is pending) he has to be dealt with only as a juvenile since on the date of the incident he did not complete 18 years of age. Even though the trial was completed before the new Act had come into force, since the appeal is pending, the provisions of the new Act shall be applied in this case. Therefore, the accused has to be treated only as a 'Juvenile' and hence the sentence imposed on him shall be set aside.
He submitted that in RAMESH v.. STATE OF MADHYA PRADESH [2004 Crl.LJ 62] wherein a Division Bench of Madhya Pradesh High Court has held in a similar situation under [Narcotic Drugs and Psychotropic Substance (Amendment) Act (9 of 2001)] that:-
"It is settled in law that an appeal is continuation of the trial.
....
Sub-section (1) of Section 41 of the Amendment Act, 2001 postulates that all cases pending before the Courts or under investigation at the

commencement of the Act shall be disposed of in accordance with the provisions of the principal Act as amended by the said Act and any person found guilty of any offence punishable under the Principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence. Applying the science of interpretation and taking recourse to the art of acceptation, we are inclined to interpret that the main provision shall apply to the appeals because the language employed in the provision is 'all cases pending before the Court'. When the word Court has been used there is no reason or justification to exclude the appellate Court."

In JAYENDRA v.. STATE OF U.P. [AIR 1982 SC 685] the Supreme Court has held as follows:
" Sec.2(4) of the Uttar Pradesh Children Act, 1951 (U.P. Act No.1 of 1952) defines a child to mean a person under the age of 16 years. Taking into account the various circumstances on the record of the case we are of the opinion that the appellant Jayendra was a child within the meaning of this provision on the date of the offence. S.27 of the aforesaid Act says that notwithstanding anything to the contrary in any law, no court shall sentence a child to imprisonment for life or to any term of imprisonment. S.2 provides, in so far as it is material, that if a child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years. In the normal course, we would have directed that the appellant Jayendra should be sent to an approved school but in view of the fact that he is now nearly 23 years of age, we cannot do so. For these reasons, though the conviction of the appellant Jayendra has to be upheld, we quash the sentence imposed upon him and direct that he shall be released forthwith."

The learned counsel submitted that the provisions of the Act 56 of 20 00 is applicable to this case and hence the appellant has to be construed as a juvenile and hence the sentence of imprisonment has to be set aside.

6. The learned Government Advocate (Criminal Side) submitted that a Division Bench of this Court in RAJAN @ THIRUVENGADA KARTHIGEYAN [1993 MLJ Reports (Criminal) 257] has held as follows:
" In JAYAKUMAR v.. STATE, 1991 LW (Crl.) 592, the appellant was a juvenile both on the date of the occurrence and on the day he was brought before the learned Magistrate but he had completed 18, on the day when the trial actually commenced. Padmini Jesudurai, J. after noticing the difference in the provisions, between the Tamil Nadu Children Act and similar other Acts in other States held that "Regarding the crucial date, should it be the date of offence or date of conviction, held that once a Magistrate, on an enquiry under Sec.37(1) of the Tamil Nadu Children Act declared the age of the appellant to be below 18, he could be dealt with only under the provisions of the Act throughout. The Act does not contemplate a change in the situation depending upon whether or not the accused completes 18 during the pendency of the trial. If on the date when the Magistrate determines his age he is found to he either a 'child' or a 'young person', he would continue to be so, until

the conclusion of the trial and the sentence to be imposed on him would depend upon the other provisions of the Act. In Dhanapal v.. State, 1991 L.W.(Crl.) 73, one of us (Arunachalam, J.) has held that declaration made by a Magistrate after due enquiry under Sec.37 of the Tamil Nadu Children Act cannot be invalidated by subsequent proof that the age had not been correctly stated to court. After the coming into force of the Juvenile Justice Act, the date of commission of the offence is the criterion and not the date of conviction,...."

Therefore, he contended that the crucial date is the date of the offence; on that date the appellant was not a juvenile as per Act 53 of 1 986 and hence the conviction and sentence cannot be set aside and the appeal has to be dismissed.

7. From the above decisions of this Court, the question whether this appellant has to be construed as a juvenile or not, has to be determined on the date of commission of offence (8.11.1992, when the Juvenile Justice Act, 1986 was in force). As per Sec.2(h) of the Act - 'Juvenile' means a boy who has not attained the age of sixteen years. When so construed, the appellant was not a juvenile on the date of commission of offence. Act 53 of 1986 was repealed and Act 56 of 2 000 came into force from 1.4.2001. Section 2(k) of Act 56 of 2000 defines that, "juvenile" is a person who has not completed eighteenth year of age. As per the decision of this Court, referred above, the date of commission of the offence is the criterion. So viewed, the definition of juvenile as found in Act 56 of 2000 cannot be applied to this case.

8. Now, it is necessary to refer to the relevant provisions of ' Repeal and Savings' found in Act 53 of 1986 as well as Act 56 of 2000. Section 63 of Act 53 of 1986 is as follows:
"Repeal and savings. - If, immediately before the date on which this Act comes into force in any State, there is in force in that State, any law corresponding to this Act, that law shall stand repealed on the said date:
Provided that the repeal shall not affect -
(a) the previous operation of any law so repealed or anything duly done or suffered thereunder; or
(b) any right privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;
and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if this Act had not been passed."

Section 69 of Act 56 of 2000 is thus worded:-
"Repeal and savings. - (1) The Juvenile Justice Act, 1986 (53 of 198 6) is hereby repealed.
(2) Notwithstanding such repeal, anything done or any action taken

under the said Act shall be deemed to have been done or taken under the corresponding provisions of this Act.
Thus, the effect of repeal of Act 53 of 1986 by Act 56 of 2000 is different from the effect of repeal of other laws by Act 53 of 1986.

As per Sec.63 of Act 53 of 1986 any law corresponding to Act 53 of 1 986 stood repealed on the date of commencement of that Act. Further, it was provided that such repeal shall not affect the previous operation or anything done thereunder; or any liability accrued or incurred, or any penalty or punishment incurred in respect of any offence or any legal proceeding or remedy in respect of any penalty or punishment; such legal proceedings may be instituted, continued or enforced and any penalty or punishment may be imposed as if Act 53 of 1986 had not been passed. That is, notwithstanding the repeal of any existing law by Act 53 of 1986 all judicial proceedings including investigation, trial or punishment shall be continued and concluded as per the law that was in force on the date of offence. Such offences shall be tried and punished as if Act 53 of 1986 did not come into force. Therefore, the Division Bench of this Court held as stated above.

9. If the repealing provision - Section 69 in Act 56 of 2000 - was also to the same effect, the argument of the Government Advocate has to be accepted and the appellant herein shall be dealt with as per the provisions of Act 53 of 1986, in which case the appellant cannot be construed as a juvenile. But, Section 69 of Act 56 of 2000 is differently worded. Anything done or any action taken under the repealed Act (53/1986) shall be deemed to have been done or taken under the corresponding provisions of Act 56 of 2000. That is, the provisions of S.69 of the Act makes Act 56/2000 retroactive in so far as the proceedings pending investigation, trial or punishment. That is, the provisions of Sec.69 in very clear terms provides that anything done or any action taken under Act 53 of 1986 shall be deemed to have been done or taken under the corresponding provisions of Act 56 of 2000. [The words "Notwithstanding such repeal" in Sec.69 is superfluous; it has to be ignored.] Therefore, all the provisions, including the definition of juvenile, applies to all the proceedings pending investigation, trial or punishment on the date of commencement of Act 56 of 2 000. Appeal is a continuation of trial. Hence, the provisions of Act 56 of 2002 is applicable to this appeal.

10. Though the trial was over and the judgment was delivered on 21 .6.1996 long before the commencement of Act 56/2000, yet, in view of the wordings of Section 69 of the Act, the appeal has to be disposed of only applying the provisions of Act 56 of 2000. As stated above, Act 56 of 2000 is retroactive with respect to the pending proceedings. It is tantamount to amendment of Act 53 of 1986 with respect to pending proceedings. The Supreme Court in BARAI v.. HENRY AH HOE [AIR 1983 SC 150] has held that:-
" It is settled both on authority and principle that when a later statute again describes an offence created by an earlier statute and imposes a different punishment, or varies the procedure, the earlier statute is repealed by implication. In Michell v. Brown, (1858) 120 ER 909, 912 Lord Campbell put the matter thus:
" It is well settled rule of construction that, if a later statute again describes an ofence created by a former statute and affixes a different

punishment, varying the procedure, the earlier statute is repealed by the later statute; See also Smith v. Benabo, (1937) 1 All ER 523."
In Regina v. Youle, (1861) 158 ER 311 315-316 Martin, B. said in the oft-quoted passage:
"If a statute deals with a particular class of offences, and a subsequent Act is passed which deals with precisely the same offences, and a different punishment is imposed by the later Act, I think that, in effect, the legislature has declared that the new Act shall be substituted for the earlier Act."
The rule is however subject to the limitation contained in Article 20 (1) against ex post facto law providing for a greater punishment and has also no application where the offence described in the later Act is not the same as in the earlier Act i.e. when the essential ingredients of the two offences are different."
This decision applies squarely to the present case.

11. The accused had submitted his School Transfer Certificate in which his date of birth given as 1.6.1975. But, the trial Court did not accept this; it rejected the Certificate on the ground that no birth extract was filed or oral evidence was adduced. The School Transfer Certificate has been filed by the accused when he was examined under Sec.313 CrPC. Any statement made when questioned under Sec. 313 CrPC may be construed as oral evidence of the accused and any document filed along with that has to be considered as evidence, ofcourse subject to admissibility. The rejection of this document by the trial Court is not correct in view of the decision of the Supreme Court in STATE OF PUNJAB v.. S.C. CHADHA [(2004) 3 SCC 394]. The Supreme Court in that case has held that in the absence of any Birth Certificate, the School Transfer Certificate shall be taken as proof of the age of the person concerned. Therefor e, in view of the Transfer Certificate filed along with 313 CrPC statement, it has to be considered. According to this, his date of birth is 1.6.1975. The date of commission of offence is 8.11.1992. Therefore, on the date of commission of offence the appellant had completed 17 years, 5 months and 7 days. That is, he was a juvenile on that date, as per Act 56 of 2000.

12. As per Sec.3 of Act 56 of 2000, where an inquiry has been initiated against a "juvenile in conflict with law" and during the course of inquiry he ceases to be such, yet the inquiry may be continued and orders may be passed as if such person had continued to be a juvenile or a child. Therefore, the appellant has to be considered as a "juvenile in conflict with law" and be treated as juvenile.
The Division Bench of this Court in RAJAN v.. KARTHIGEYAN [1993 MLJ REPORTS (Crl) 257] has held -
"The Children Act as well as the Juvenile Justice Act treat the delinquent children/juveniles as a special class and provide special procedure for enquiry in respect of charges levelled against them. Even if those charges are established, a very liberal approach has been provided in respect of punishment for such offences. Different sections put a strict bar on the child/juvenile being sent to jail custody either before an enquiry or after the conclusion of the enquiry in respect of the offence alleged or proved to have been committed. Even if such a child has committed a murder, in view of

Sec.22, neither he can be sentenced to death nor to imprisonment. It is true that in many cases as in the present one, the offences committed by such delinquent children may be shocking to the conscience and their conduct and behaviour may be abhorring but Sec.22 is quite conscious of such situations. Still it provides for keeping the delinquent child/juvenile accused of such serious offences in safe custody at the place ordered by the State Government. This benefit has to be extended not only to an accused who is a child/juvenile at the time of the commission of the offence and has continued as such till the conclusion of the enquiry, but even to an accused who has ceased to be a child/juvenile during the pendency of the enquiry."

13. In view of the above decision and also in view of the provisions of Sec.16 of Act 56 of 2000 that juvenile shall not be sentenced to imprisonment, or committed to prison, the appellant cannot be sent to jail.

14. In view of the provisions contained in Sec.20 of Act 56 of 2000 , the appellant herein is referred to the Juvenile Board for passing appropriate orders.

15. With the above direction the criminal appeal is disposed of. No costs.

Index: Yes
Internet: Yes

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